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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932

PETER ROSSI and
EDWARD EHRETT,
Petitioners,
vs.
UNITED STATES OF
AMERICA,
Respondent

No. 594

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

I. R. WASSON,
Attorney for Petitioners

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, PETER ROSSI and EDWARD EHRETT, respectfully represent unto this Honorable Court that heretofore, to-wit, on the 6th day of November, A. D. 1930, that being one of the days of the October Term, A. D. 1930, of the District Court of the United States for the Northern Division of the Southern District of Illinois, the grand jury of said

Division and District returned into said Court an indictment against your petitioners. The indictment consisting of five counts, charging petitioners with having violated various internal revenue laws of the United States.

Count one (Rec., pp. 2-3)charges a violation of Title 26, Section 306, U. S. C. A. (R. S. 3281), in that they carried on the business of a distiller with intent to defraud the United States of the special tax of one dollar and ten cents ($1.10) on 120 gallons of spirituous liquor.

Count two (Rec., pp. 3-4) charges a violation of Title 26, Section 241, U. S. C. A. (R. S. 3247), in that they did engage in and carry on the business of a distiller, and engage in and carry on the business of separating 120 gallons of alcoholic spirits by the process of evaporizing fermented corn sugar mash, then and there intending to defraud the United States of the tax of one dollar and ten cents ($1.10).

Count three (Rec., pp. 4-5) charges a violation of Title 26, Section 284, U. S. C. A. (R. S. 3260), in that the appellants, at Pekin, Tazewell County, Illinois, in the Northern Division of the Southern District of Illinois, within the Eighth Internal Revenue Collection District of Illinois, and within the Thirteenth Prohibition District of the United States, did unlawfully, etc., carry on the business of a distiller without having given bond as required by law.

Count four (Rec., p. 6) charges a violation of Title 26, Section 281, U. S. C. A. (R. S. 3258), in that the appellants,

at the same place, on September 10, 1929, had in their possession a still and coil, etc., being attached to and used in connection with a condenser, boiler, etc., which still had not been registered with the Prohibition Administrator for the Thirteenth Prohibition District of the United States.

The facts out of which the above indictment grew are as follows:

On September 8th, 1929, prohibition agents went to the premises, the private dwelling of Adolph and Nellie Faux, located at 1516 South Fifth Street, in the City of Pekin, Illinois. The agents drove around the premises and they say they could smell fermenting mash and hear the buzz or hum of an electric pump in the basement. On September 10th, two days later, at about nine or ten o'clock in the morning, Federal prohibition agents again visited the premises; they drove up in front of the premises and stopped; they say they could smell the odor of alcohol, the cooking odor. They then went upon the premises and passing the house they looked in and saw a still and heard the pump of the oil burner. They saw no one attending the still. Then they walked to the back door and called "Hello" and in a short time a man appeared, who was later known as Ehrett. Agent Johnson asked Ehrett if he had a still down there and he said "No," and Ehrett came out and Agent Johnson said, "Do you care if I go down and look?" and he (Ehrett) started to leave, and he (Johnson) said, "No you are not going to leave; you are going back with us."

They then proceeded to search the premises without a

search warrant. In the attic of the premises they found Rossi, who said he was there fixing a radio. There was no evidence of any sales of intoxicating liquor from that residence. Timely motions to suppress the evidence were made. The petitioners claimed they were in said residence as guests and employees, and therefore entitled to the same constitutional rights as the dwellers therein and the Government did not file any reply to these motions. Just how the Government sought to defend this search and seizure is not apparent in the record.

No evidence was offered by the Government to show that Pekin, Illinois, was in the Thirteenth Prohibition District of the United States.

That thereafter on to-wit: the 17th day of November, A. D. 1930, the cause came up for trial before the Court for a hearing, a jury having been waived. There was a finding of guilty on all counts except the fifth count.

A judgment was entered in said Court and sentence passed, which said judgment and sentence was as follows:

14 * * (Caption) * *

Thursday, December 18, 1930

Court met pursuant to adjournment.

Present: the Honorable Louis FitzHenry, Judge.

And now on this 18th day of December, A. D. 1930, comes again the United States, the plaintiff in this case, by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants, Peter Rossi, alias Peter Russo, and Edward Ehrett, in their own proper persons and by John E. Daugherty, Esq., their attorney and the Court having heard and duly considered the motion of

said defendants for a new trial and being thus fully advised in the premises, overruled the same, to which ruling of the Court the defendants, by their attorney, then and there duly excepted. And thereupon the said defendants entered a motion in arrest of judgment and the Court having heard and duly considered the same, it is ordered that said motion be, and is hereby overruled, to which ruling of the Court the defendants then and there, by their attorneys, duly excepted. Judgment on the verdict.

And the said defendants now being arraigned at the bar of the Court for sentence and each having nothing to say why sentence should not be pronounced against him. It is therefore considered and adjudged by the Court that the said defendants, Peter Rossi, alias Peter Russo, and Edward Ehrett for the offenses by each committed in manner and form as charged in counts one, two and three of the said indictment and as found by the jury in this case, each be confined in the United States Penitentiary at Leavenworth, Kansas, for a period of eighteen months on each of said counts, the sentences of imprisonment herein pronounced on counts one and two of said indictment to run concurrently with sentence of imprisonment pronounced on said count three of said indictment—and for the offense by each committed in manner and form as charged in count four of the said indictment, and as found by the jury in this case be confined in the said United States Penitentiary, at Leavenworth, Kansas, for a period of eighteen months, the sentence of imprisonment herein pronounced to run consecutively to the sentence of imprisonment pronounced on counts one, two and three of said indictment—and also to each pay a fine to the United States in the sum of five hundred dollars on each of counts one, three and four of the said indictment, together with the costs of this prosecution, amounting to the sum of dollars, that execution issue therefor and that said defendants stand committed in said United States Penitentiary, at Leavenworth, Kansas, until the amounts of their respective fines and costs shall have been fully paid or until otherwise discharged by due process of law.

And it is further ordered by the Court that the clerk issue a writ of commitment commanding the Marshal to forthwith take the said Peter Rossi, alias Peter Russo, and Edward Ehrett and to deliver them, together with a true copy of said writ of commitment to the Warden of the United States Penitentiary at Leavenworth, Kansas.

15a It is further ordered by the Court that the verdict herein as to count five of the said indictment be, and is hereby set aside and the said defendants, Peter Rossi, alais Peter Russo, and Edward Ehrett, found not guilty of the charge therein.

That thereafter, to-wit, on the 19th day of December, A. D. 1929, your petitioners filed their petition for appeal which said petition was on that date allowed, and on, to-wit: the 26th day of July, 1930, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, and said cause was entered and docketed in said Court of Appeals, entitled "Peter Rossi and Edward Ehrett, plaintiffs in error, v. United States of America, defendant in error," and numbered 4594 on said docket.

That the assignment of errors filed in said cause was as follows, to-wit:

54 * * (Caption) * *

ASSIGNMENT OF ERRORS

Now come the defendants, Peter Rossi and Edward Ehrett, and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above mentioned cause from the orders and judgment of this Honorable Court, entered on the 18th day of December, A. D. 1930.

1. The United States District Court for the Southern District of Illinois erred in overruling and denying the defendants Motion in Arrest of Judgment and entering judgment against them in this case.

2. The District Court erred in overruling and denying the Petition of the defendants to suppress evidence, and in permitting the Government to make proof of the illegal search and seizure.

3. The indictment and each count thereof fails to state
55 any offense against the laws of the United States.

4. The indictment and each count thereof fails to furnish the accused with such a description of the charges against them as will enable them to plead former jeopardy.

5. The indictment and each count thereof fails to set forth the alleged acts of the defendants with reasonable particularity of time, place and circumstance.

6. There is no such substance or thing known to the Internal Revenue Laws of the United States as moonshine whiskey and hootch.

7. There is no evidence in the Record to show that any offense was committed in the Eighth Internal Revenue Collection District of Illinois, or in the Thirteenth Prohibition District of the United States.

8. There is no evidence in the Record that shows to the Court that the alleged still was not registered with the Prohibition Administrator of the Thirteenth Prohibition District of the United States, or that a bond with at least two sureties had not been executed and approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States, in manner and form as provided by law.

9. There is no evidence in the Record that shows that these defendants were persons who were required to register the alleged still or execute a bond herein.

10. The evidence wholly and entirely fails to show that these defendants or either of them is guilty in manner and form as charged in the indictment.

11. The indictment and each count thereof is drawn
56 under statutes of the United States that had been and were repealed at the time of the commission of the alleged offense, and were directly in conflict with the Act of Congress of October 28th, 1919, commonly known as the National Prohibition Act, whereby they were not reenacted by the Act of Congress of November 23rd, 1921, commonly known as the Willis-Campbell Act, and the Court therefore does not have jurisdiction of the subject matter herein.

PETER ROSSI
EDWARD EHRETT

By: JOHN E. DOUGHERTY,
Attorney for Defendants.

Filed Dec. 19, 1930. S. T. Burnett, Clerk.

That afterwards, to-wit: on the 8th day of October A. D. 1932, the case came on to be heard in the Circuit Court of Appeals before the Honorable Samuel Alschuler, Honorable Evan A. Evans and Honorable Wilkerson. On the 8th day of October, A. D. 1932, a judgment was entered in said cause by the Circuit Court of Appeals of the Seventh Circuit as follows:

> "This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.
>
> "On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed."

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final, and is erroneous, and that this Honoroble Court should require the case to be certified to it for its review and determination, under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

Your petitioner presents the following grounds upon which this writ of error is sought:

SPECIFICATION OF ERRORS RELIED UPON

1.

The Circuit Court of Appeals erred in overruling and deny-

ing the motion of the petitioners to suppress evidence, and in permitting the Government to make proof of the illegal search and seizure.

2.

There is no evidence in the record to show that any offense was committed in the Eighth Internal Revenue Collection District of Illinois or in the Thirteenth Prohibition District of the United States.

3.

There is no evidence in the record that shows that the alleged still was not registered with the Prohibition Administrator of the Thirteenth Prohibition District of the United States, or that a bond with at least two sureties had not been executed and approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States in manner and form as provided by law.

4.

There is no evidence in the record that shows that these appellants were persons who were required to register the alleged still or execute bond herein.

5.

The evidence wholly and entirely fails to show that these petitioners or either of them is guilty in manner and form as charged in the indictment.

6.

It is the contention of petitioners that the Circuit Court of Appeals erred in holding that Ehrett waived his constitutional rights as to the search, there being no evidence in the record.

BRIEF OF ARGUMENT

1.

The District Court erred in overruling and denying the motion to suppress evidence and in permitting the Government to make proof of the illegal search and seizure.

Title 27, Sec. 39, U. S. C. A.;
Title 18, Sec. 53, U. S. C. A.;
Lawson v. United States, 9 Fed. (2nd) 747;
Raniele v. U. S., 34 Fed. (2nd) 877;
United States v. Di Corvo, 37 Fed. (2nd) 124;
United States v. Rabstein, 41 Fed. (2nd) 227;
Temporini v. United States, 299 Fed. 365;
United States v. Dean, 50 Fed. (2nd) 905.

One temporarily domiciled in a residence as guest or employe of its owner at time of unlawful search and seizure of still or liquor, was entitled to claim the benefit of motion to suppress, though he did not own building and claimed no interest in the still.

Alvan v. United States, 33 Fed. (2nd) 467;
United States v. DeBousi, 32 Fed. (2nd) 902.

"The plea of not guilty entered in the case at bar is a denial by the defendant that he operated the stills without registering, paying the tax or giving bond. Failure to register, to pay the tax and give the bond when operating the stills are the acts, which, under the law, constitute the offenses, and we cannot hold that implicit either in the defendant's silence or in his denial of the commission of the offence there is an admission of its commission. The question of guilt is to be determined by evidence of the doing or failure to do what the law forbids or requires. Under the plea of not guilty the offenses charged stand out, waiting to be proved by the one that makes the accusation. * * * * Although the Eighteenth Amendment to the Constitution and the National Prohibition Act have greatly affected the manufacture and sale of distilled spirits, they have not repealed the provisions of the Revenue Laws herein issued (page 224). These provisions forbid the distillation of liquor without compliance with their requirements. When not complying with, a still is illicit; when complying with, a still is licit, so that it is affected by this class of legislation. It is a wholly lawful or a wholly unlawful thing, and when in a criminal action under the Revenue Laws it is charged to be unlawful, its character cannot be determied merely by possession, but must be determined by evidence that its possession is not accompanied with the formal requirements conclusive of those laws. Evidence of such fact is always available at the office of the local Collector of Internal Revenue. There is, in the record, no evidence of any kind on these issues. Therefore, we are constrained to reverse the judgment under the first, second, third and fourth counts of the indictment." (The counts of the indictment reversed were the counts charging a violation of the Revenue Laws.)

Mansbach v. United States, 11 Fed. (2nd) 221.

"During the night, November 18th, 1930, a squad (six or more) prohibition agents while returning to Baltimore City discussed premises 5100 Curtis Avenue, of which there had been complaints 'over a period of about a year.' Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building, is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are part of the same premises.

"As the agents approached the garage, they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many cardboard cases which they thought contained jars of liquor. Thereupon they broke the fastening upon a door, entered, and found 122 cases of whiskey. No one was within the place, and there was no reason to think otherwise.

"While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him.

"Although over a considerable period numerous complaints concerning the use of the premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover a short period of watching would have prevented any such possibility.

"We think, in any view, the action of the agents was inexcusible and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

Taylor v. United States, Vol. 52, Supreme Court Report, page 466.

In the United States v. Agnello, 269 U. S., page 20, 70 Law Ed. page 145, Pn. page 147, Justice Butler, delivering the opinion of the Supreme Court, said:

"The protection of the 4th Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search

warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, Chap. 85, Title II, Sec. 25, 41 Stat. at L. 305, 315, Comp. Stat. Sec. 10, 138½m, Fed. Stat. Anno. Supp. 1919, p. 213, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel, or boarding house. And later, to the end that Government employees, without a warrant, shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States, engaged in the enforcement of any law, to search a private dwelling house without a warrant directing a search. Act of November 23, 1921, Chap. 134, 42 Stat. at L. 222, 223, Comp. Stat. Sec. 10, 184a, Fed. Stat. Anno. Supp., 1921, p. 230. Safeguards similar to the 4th Amendment are deemed necessary and have been provided in the constitution or laws of every state in the Union. We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect to intoxicating liquors, there are provisions similar to those in Sec. 25, of the National Prohibition Act. Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, Federal or State, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See Entick v. Carrington, 19 How. St. Tr. 1030, 1066. Belief, however

well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding facts unquestionably showing probable cause. See Temperani v. United States (C. C. A. 9th), 299 Fed. 365; United States v. Rembert, (D. C.) 284 Fed. 996, 1000; Connelly v. United States, (D. S.), 275 Fed. 509; McClurg v. Brenton, 123 Iowa, 368, 372, 65 L. R. A., 519, 101 Am. St. Rep. 323, 98 N. W. 881; People v. Margolis, 220 Mich., 431, 190 N. W. 306; Childers v. Com. 198 Ky. 848, 250 S. W. 106; State v. Warfield, 184 Wis. 56, 198 N. W. 854."

United States v. Richards (D. C.) 22 Fed. (2d) 988: The officers had evidence that a large distillery was being operated on the premises in question, a private dwelling. They had no evidence that any sales or deliveries of liquor were taking place there. The search warrant was applied for and obtained without any allegation of sale. It is said that it was issued not under the National Prohibition Act, but under the internal revenue statute, (R. S. Sec. 3281; U. S. Comp. Stat. 1916, Sec. 6021 (26 USCA, Sec. 306), which makes it criminal to carry on the business of a distiller without having given bond, etc. The contention of the Government is that search warrants for dwellings may be obtained under this statute without any evidence of sale.

The Court held that limitations on the issue of search warrants contained in Section 25 of the National Prohibition Act (27 USCA, Sec. 39) are applicable under this revenue

statute and there must be evidence of sales and search warrant was quashed.

Thompson v. United States (C. C. A.), 22 Fed. 2d) 134: In that case, where a private dwelling had been searched by Government officers and state police acting together, the Court said of and concerning the search of a private residence:

"It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States of section 25 of title 2 of the National Prohibition Act. (27 USCA, Sec. 39) and of title 11 of the Espionage Act of June 15, 1917, (40 Stat. 228 USCA 18, Sec. 611 et sep.) is to forbid the search of a private dwelling by a national prohibition agent without a search warrant and to require that a search warrant shall not issue to search a private dwelling, unless it is being used for the unlawful sale of intoxicating liquor."

United States v. Bosparino (D. C.), 21 Fed. (2d) 575: "The important question, however, is whether a private dwelling used as such, was not immune from search without evidence of sale of liquor therefrom. Section 25 of title 2 of the National Prohibition Act (27 USCA, Sec. 39, Comp. St. Sec. 10138½) provides that no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for unlawful sale of intoxicating liquor or unless it is in part used for some business purpose, such as a store, saloon, restaurant, hotel or boarding house. The apartments in question concededly were neither used for dealing in intoxicating liquor, nor was any part used for any business pur-

pose, and therefore the search warrant was illegal and must be vacated and the evidence of seizure suppressed, since it can afford no basis for unlawful possession or manufacture: Jozwich v. United States (C. C. A.) 288, Fed.831; Gouled v. United States, 255 U. S., 298, 41 Sup. Ct. 261, 65 L. ed. 647; United States v. Kelih (D. C.), 272, Fed. 485; and United States v. Deloie (D. C.), 2 Fed. (2d) 377. And this interpretation has heretofore been applied in cases of a similar showing coming before this Court."

Bell v. United States (C. C. A.), 9 Fed. (2d), 820: The Court said in this case, no attempt has been made to uphold the validity of the search warrant in this Court, and it was confessedly void, because issued to search a private dwelling occupied as such without any proof that the dwelling was used for the unlawful sale of intoxicating liquor.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the Act of Congress, approved March 3rd, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed

by this Honorable Court, and for such further relief as may seem proper.

And your petitioner will ever pray.

PETER ROSSI

EDWARD EHRETT

United States of America,
Southern District of Illinois,
County of Peoria.

Peter Rossi and Edward Ehrett, being first duly sworn, upon his oath deposes and says that he has read the foregoing petition by him subscribed, and the facts therein stated are true to the best of his information and belief.

PETER ROSSI

EDWARD EHRETT

Subscribed and sworn to before me this 27th day of December, A. D. 1932.

JOSEPH G. KELLERSTRASS,
Notary Public.

(Seal)

In the

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932

Peter Rossi and Edward Ehrett,
Petitioners,
vs. No.....
United States of America,
Respondent.

NOTICE OF APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI.

The responent is hereby notified that petitioner will on....., the..... day of....., 1933, upon his petition and a copy of the entire record in this cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (copy of which and of the petition for writ of certiorari and brief in support thereof, as hereinbefore set forth, are herewith delivered to you) to the Supreme Court of the United States in its court room at the Capital in the City of Washington, D. C.

.....

Attorney and Counsel for Petitioners.

Service of the foregoing notice is hereby accepted and the delivery of a copy thereof, and of the petition for writ of certiorari and brief in support thereof referred to herein, are hereby acknowledged this ..... day of ....., 1932.

.....

Attorney and Counsel for Respondent.